Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

PAULA WILSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents a question as to the correct interpretation of the federal bank fraud statute, 18 U.S.C. § 1344. The lower court's interpretation of the statute is in direct conflict with the decisions of several other Circuit Courts.

The question presented is whether the federal bank fraud statute applies to a fraudulent scheme to obtain federally guaranteed student loans by means of a false student loan application, where no federally insured financial institution suffered a loss or was exposed to a risk of loss by the scheme.

The issue underlying the question presented is whether the federal bank fraud statute encompasses fraudulent schemes that do not victimize a bank or subject a bank to an actual or potential loss. The lower court held that subsection 2 of 18 U.S.C. § 1344 encompasses any conduct where bank funds are transferred in the course of committed "fraud on someone," even though no bank is victimized or exposed to an actual or potential loss. The majority of Circuit Courts take the opposite position, holding that both subsections of the bank fraud statute encompass only fraudulent schemes that victimize a bank by exposing the bank to an actual or risk of loss.[1]

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1. There is presently pending before the Court a petition for a writ of certiorari from a separate case, *United States v. McNeil*, 320 F.3d 1034 (9th Cir. 2003), which also presents an issue relating to the correct interpretation of the federal bank fraud statute and whether the statute requires evidence of a loss to the subject financial institution. The petition was filed on May 23, 2003, but has not yet been responded to.

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The judgment of the United States District Court for the Eastern District of Michigan is unreported and set forth in the Appendix. (App., *infra*, 6a-10a). The opinion of the Sixth Circuit Court of Appeals, affirming Paula Wilson's convictions, is unreported and set forth in the Appendix. (App., *infra*, 1a-5a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on March 7, 2003. (App., *infra*, 1a-5a). Petitioner timely filed a petition for rehearing *en banc* which was denied on May 27, 2003. (App., *infra*, 11a-12a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Paula Wilson was charged with two counts under the federal bank fraud statute, 18 U.S.C. § 1344, which provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice —
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false

> or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

The United States charged Paula Wilson with committing bank fraud by submitting a false student loan application to a state guarantee agency, which in turn, agreed to guarantee a student loan.[2] The application provided that Paula Wilson was applying for a federally guaranteed student loan to attend medical school in Costa Rica. The Government argued that Paula Wilson, a sixty year-old homemaker living in Bridgeport, Michigan, submitted the application fraudulently, and that she never intended to attend the medical school. Trial counsel for Paula Wilson argued that Paula Wilson's adult son submitted the application without her knowledge to obtain the funds for himself. Paula Wilson was found guilty of bank fraud and conspiring to commit bank fraud.[3]

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2. Paula Wilson was charged with one count of conspiracy to obtain federally guaranteed student loans by submitting false student loan applications in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1344, and one count of submitting or aided and abetted another in submitting a fraudulent student loan application in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 2.

3. At stake is Paula Wilson's ability to continue living in the United States. Paula Wilson is a native of Panama. Although she has legally resided in the United States since 1958, she never attained U.S. citizenship. The two felony bank fraud convictions will subject her to removal proceedings.

At trial, the United States presented evidence explaining the operation of the federally guaranteed student loan process. A borrower obtains a federally guaranteed student loan by completing an application and promissory note. The application contains sections to be completed by the borrower and the school. Typically, the school completes the school portion, verifying that the student is enrolled, and submits the application to a guaranty agency. The guaranty agency decides whether to guaranty the loan, and notifies the bank, which then issues the loan.

If the borrower defaults for any reason, the guaranty agency pays the bank the total amount of principle and accrued interest. The guaranty agency is then reimbursed by the Department of Education, which ultimately sustains the loss. In short, regardless of whether the student loan is obtained by fraud or by legitimate means, the bank is never exposed to a risk of loss because the loan is federally guaranteed.

Paula Wilson's application was processed by the Michigan Guaranty Agency, an agency of the Michigan Department of Treasury. The guaranty agency guaranteed the loan, which was made by the Michigan National Bank. When it was discovered that Paula Wilson was not attending the medical school, the loan was placed in default. Once in default, the Michigan Guaranty Agency paid the Michigan National Bank the total amount of principle and interest due on the loan. The guarantee agency, in turn, was reimbursed by the Department of Education. Neither the Michigan National Bank nor any other federally insured financial institution sustained a loss as a result of the issuance of the loan or the default.

Paula Wilson was convicted on both counts. Paula Wilson made a motion for acquittal, arguing that the United States had presented insufficient evidence that she committed bank fraud. The motion was denied, and Paula Wilson appealed[4], arguing that she had not committed bank fraud within the meaning of 18 U.S.C. § 1344, because the alleged student loan scheme did not expose a federally insured financial institution to a loss or risk of loss. Although the conduct at issue may have constituted "fraud on someone" (ie., the guarantee agency or the Department of Education), there was no evidence that Paula Wilson committed bank fraud within the meaning of 18 U.S.C. § 1344.

On appeal[5], the Sixth Circuit rejected Paula Wilson's argument that the United States was required to show that she intentionally subjected a federal bank to a risk of loss, finding that such argument had been foreclosed by its prior decision in *United States v. Everett*, 270 F.3d 986 (6th Cir. 2001). In *Everett*, the Sixth Circuit held that the government need not show that a bank was exposed to a risk of loss in order to establish the requisite intent under subsection 2 of 18 U.S.C. § 1344, holding: "It is sufficient if the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession

4. The basis for the Sixth Circuit's appellate jurisdiction was 28 U.S.C. § 1291, as it was an appeal from a final decision of a United States District Court that disposed of all counts of the Government's indictment against Paula Wilson and her co-defendant Barbara Sanders. The basis for the District Court's subject-matter jurisdiction was 18 U.S.C. § 3231, as Paula Wilson was charged with an offense against the laws of the United States.

5. Paula Wilson was tried with co-defendant Barbara Sanders. Both filed separate appeals, which were consolidated by the Sixth Circuit.

and control." *Id.*, 270 F.3d at 991, *emphasis in original.* Because the Sixth Circuit found that there was sufficient evidence to find that Paula Wilson committed "fraud on someone," and that this conduct had caused the bank to issue student loan checks, the lower court affirmed her convictions, even though the United States had failed to prove that the alleged conduct victimized a bank or subjected a bank to a loss or risk of loss.

The holding of the Sixth Circuit below is in direct conflict with the decisions of several Circuit Courts, which have interpreted both subsections of 18 U.S.C. § 1344 as requiring evidence that the defendant intended to victimize a federally insured financial institution by exposing it to a loss or risk of loss.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Decision Below is in Conflict with the Decisions of Several Other Circuit Courts.

A. There is a Direct, Irreconcilable Conflict Among the Circuit Courts on the Underlying Issue of Whether 18 U.S.C. § 1344 Requires a Showing that a Federally Insured Financial Institution was Victimized by Being Exposed to an Actual or Potential Loss.

1. The Sixth Circuit's Decision Below Rests on an Interpretation of Subsection 2 of 18 U.S.C. § 1344 That Does Not Require a Showing that a Bank was Victimized by Being Exposed to an Actual or Potential Loss; The Lower Court Held that it is Sufficient if, in the Course of Committing "Fraud on Someone," Funds Under the Bank's Control are Transferred.

The majority of Circuit Courts that have addressed the issue, have held that in order to support a conviction under either subsection of 18 U.S.C. § 1344, it must be established that the defendant exposed a federally insured financial institution to an actual or risk of loss. In direct conflict, viewing the issue as a question of the requisite intent under subsection 2 of 18 U.S.C. § 1344, in *United States v. Everett*, 270 F.3d 986 (6th Cir. 2001), the Sixth Circuit held:

> to have the specific intent required for bank fraud, the defendant need not have put the bank at risk of loss in the usual sense or intended to do so. It is sufficient if the defendant in the course of committing fraud on *someone* causes a federally

> insured bank to transfer funds under its possession or control.

Id. at 911 (emphasis in original). In the present case, the Sixth Circuit followed *Everett* in holding:

> We also reject Sanders's and Wilson's claim that the Government did not prove they intentionally subjected a federal bank to a risk of loss. Our holding in *Everett* forecloses this argument. In that case, we said that a defendant need not intend to defraud a specific bank or institution. All that is required is that "the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." *Id.* at 991 (emphasis in original). Wilson and Sanders satisfied this requirement. Their fraudulent conduct caused the bank to issue student loan checks to persons who had not applied to or enrolled in the school. We thus conclude that the jury properly convicted Sanders and Wilson of bank fraud and conspiring to commit bank fraud.

See App., *infra*, 3a.

The lower court's decision is in direct conflict with the majority of Circuit Courts, which hold that both subsections of 18 U.S.C. § 1344 require a showing that the defendant victimized a bank by exposing it to an actual or potential loss. The record before the lower court established that the fraudulent student loan scheme did not expose any financial institution to a risk of loss. Hence, whereas Paula Wilson's convictions were affirmed by the Sixth Circuit, the convictions likely would have been reversed by the majority of Circuit Courts had the appeal been taken within their jurisdiction.

2. Several Circuit Courts Interpret Both Subsections of 18 U.S.C. § 1344 As Requiring a Showing that the Defendant Victimized A Bank By Exposing it to an Actual or Risk of Loss.

The Second Circuit was the first Circuit Court to recognize that the bank fraud statute only applies to conduct that victimizes a bank. In *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988), the Second Circuit reversed convictions under the bank fraud statute based on a scheme to cause individuals to transfer funds from their personal bank accounts under false pretenses. Interpreting both subsections of 18 U.S.C. § 1344, the Second Circuit held that the bank fraud statute does not apply where the victim of the fraudulent scheme is not the bank itself, even though the scheme may involve the transfer of funds under the bank's custody or control. *Id.* at 904.

The Second Circuit has since articulated this principle as an intent requirement under both subsections of 18 U.S.C. § 1344. "[A] defendant may not be convicted of federal bank fraud unless the government is able to offer proof that the defendant, through the scheme, *intended to victimize the bank by exposing it to an actual or potential loss*." *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998), *emphasis added* (vacating convictions under 18 U.S.C. §§ 1344(1) and (2) where defendants deposited fraudulently procured checks into accounts and bank became holder in due course).

> [T]he government is required to prove that a bank was an actual or intended victim, i.e., that the defendant engaged in or attempted to engage in a pattern or course of conduct designed to deceive

> a federally chartered or insured financial institution into releasing properly, *with the intent to victimize the institution by exposing it to an actual or potential loss.*

United States v. Laljie, 184 F.3d 180, 189 (2d Cir. 1999), *internal citations and quotations omitted, emphasis added* (reversing convictions on two counts of bank fraud under 18 U.S.C. §§ 1344(1) and (2) where scheme to fraudulently fill in payee line of blank checks did not expose bank to risk of loss).

In direct conflict with the position taken by the Sixth Circuit below that "fraud on someone" is "all that is required," the Second Circuit holds:

> Because § 1344 focuses on the bank, rather than on other potential victims, *a conviction under § 1344 is not supportable by evidence merely that some person other than a federally insured financial institution was defrauded* in a way that happened to involve banking, without evidence that such an institution was an intended victim.

Laljie, 184 F.3d at 189-90, *emphasis added.*

The Third Circuit is the most recent Circuit Court to adopt an interpretation of the intent requirement under subsection 2 of 18 U.S.C. § 1344 that is in direct conflict with the interpretation taken by the Sixth Circuit below. In *United States v. Thomas*, 315 F.3d 190 (3d 2002), a care-giver induced an elderly victim into drafting checks under the guise of transferring funds among several accounts or for the purchase of groceries, when in fact, the care-giver

cashed the checks and kept the funds. *Id.* at 194. The Court found that although the elderly victim suffered losses, the bank was not subjected to any loss or liability for honoring the checks. *Id.* The Court held that this was insufficient to support a conviction under either subsection of 18 U.S.C. § 1344:

> In summary, we hold that the relevant requirements under the bank fraud statute are: a defendant must execute, or attempt to execute, a scheme or artifice, *intended to victimize a federal bank or federally insured bank by causing it an actual or potential loss of its own funds*. Where the scheme involves the mere withdrawal of funds in the bank's custody, the Government must show that the withdrawal exposed the bank to some form of liability as a result of the fraud. There was none here.

Id. at 206, *emphasis added.*

The Fifth Circuit is in accord. Although not directly articulating the issue as one of intent, the Fifth Circuit interprets both sections of 18 U.S.C. § 1344 as requiring a showing that the defendant's conduct victimized the bank by exposing it to a risk of loss.

> Under our precedent, for the prosecution to prove that the offense of bank fraud has been committed, it must show not only that the money or assets in the custody or control of a financial institution were obtained by means of fraud but also that doing so placed the financial institution at risk of civil liability.

United States v. Sprick, 233 F.3d 845, 852 (5th Cir. 2000) (reversing conviction under 18 U.S.C. § 1344(2), where

"government provided no basis at trial or on appeal for concluding that the bank could have such liability"). *See also United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001) (interpreting both subsections of 1344 as requiring evidence that defendant "placed the financial institution at risk of civil liability," and reversing convictions where "no FDIC bank was put at risk").

The Fourth Circuit also recognizes a "loss" requirement under both subsections of 18 U.S.C. § 1344. In *United States v. Orr*, 932 F.2d 330, 332 (4th Cir. 1991), the Fourth Circuit vacated a conviction under 18 U.S.C. § 1344, where "the bank suffered no loss," citing the Second Circuit's decision in *Blackmon*, for the proposition that Congress did not intend the bank fraud statute to cover offenses where the fraud victim was not a federally insured bank. *See also United States v. Brandon*, 298 F.3d 307, 311-12 (4th Cir. 2002) (finding indictment satisfies requirement that defendant engage in a scheme to defraud a bank because presenting stolen and forged checks to drawee banks "exposes the banks to a potential risk of loss").

The First, Seventh and Eleventh Circuits have also articulated interpretations of 18 U.S.C. § 1344 that require the prosecution to establish that a federal insured financial institution was exposed to a real or potential loss. In *United States v. Brandon*, 17 F.3d 409, 427 (1st Cir. 1994), the First Circuit analyzed the intent requirement under both subsections of 18 U.S.C. § 1344, holding: "The specific intent under § 1344 is an intent to defraud a bank, that is, an intent to victimize a bank by means of a fraudulent scheme." *Id.* at 426. "The requisite intent for bank fraud is present if defendant's conduct was 'designed to deceive a federally chartered or insured financial institution into releasing

property, with the intent to victimize the institution by exposing it to an actual or potential loss.'" *United States v. Key*, 76 F.3d 350 (11th Cir. 1996), *citing United States v. Ragosta*, 970 F.2d 1085, 1089 (2d 1992). *See also United States v. Davis*, 989 F.2d 244, 247 (7th Cir. 1993) (reversing conviction under 18 U.S.C. § 1344(2) where depositing fraudulently obtained tax refund check did not cause the bank to sustain any loss or expose it to any potential loss).

The decision of the Sixth Circuit below is in direct conflict with these Circuit Courts. By interpreting 18 U.S.C. § 1344 as requiring merely evidence of "fraud on someone," the Sixth Circuit rejected the requirement recognized by these other Circuit Courts that in order to convict for bank fraud, it must be established that the defendant victimized the bank by exposing it to an actual or risk of loss. This petition presents an opportunity for the Court to bring harmony to the Circuit Courts' conflicting interpretations of the federal bank fraud statute.

3. Other Circuit Courts Have Joined the Conflict by Adopting Interpretations of 18 U.S.C. § 1344 Consistent with that Taken by the Sixth Circuit Below.

The Ninth Circuit has joined the Sixth in interpreting the federal bank fraud statute as not limited to instances of fraud on a bank. In *United States v. McNeil*, 320 F.3d 1034 (9th Cir. 2003)[6], the Ninth Circuit affirmed a conviction under 18 U.S.C. § 1344(2), where the defendant stole the identity of another person, opened an account in their name, and deposited a fraudulently obtained federal income tax refund

6. Presently pending before the Court on a petition for writ of certiorari, filed May 23, 2003.

into the account. The Ninth Circuit found that under subsection (2), "[a]ll the statute facially seems to require in a case involving property in the custody of control of a bank, is that there be an attempt to obtain such property from the bank by deceptive means." *Id.* at 1037. Accordingly, the Ninth Circuit held that bank fraud charges were supportable, even though the bank had suffered no loss and the defendant's "ultimate goal was to obtain funds from the IRS." *Id.*

The Tenth Circuit also has held that 18 U.S.C. § 1344(2) does not require evidence that the defendant exposed a bank to a risk of loss. "We therefore hold that the government need not prove that a defendant put a bank 'at risk' to sustain a conviction under section 1344(2)." *United States v. Sapp*, 53 F.3d 1100, 1102 (10th Cir. 1995). The Eighth Circuit also appears to have adopted the position that there is no requirement of a loss or potential loss to the bank. In *United States v. Ponec*, 163 F.3d 486, 487 (8th Cir. 1998), the Eight Circuit stated: "We hold, among other things, that the crime of bank fraud under 18 U.S.C. § 1344 does not require a showing that the defrauded bank suffered a financial loss."

Accordingly, numerous Circuit Courts have addressed the underlying issue, reaching differing conclusions. The First, Second, Third, Fourth, Fifth, Seventh and Eleventh Circuit Courts interpret both subsections of 18 U.S.C. § 1344 as requiring a showing that the defendant intended to victimize a bank by exposing it to an actual or risk of loss. The Sixth, Eighth, Ninth and Tenth Circuit Courts interpret subsection (2) of the same federal statute as not requiring such a showing. Review by this Court is necessary to bring harmony to the Circuit Court's varying interpretations of the same federal statute.

B. The Circuit Courts have Acknowledged the Conflict.

The Circuit Courts have acknowledged the conflict over their differing interpretations of 18 U.S.C. § 1344. "The Courts of Appeals are not of one mind as to the proper reading of the statute, including whether the intent requirement of subsection (1) applies to any indictment pled under the statute, or whether subsection (2) can be read wholly independently of subsection (1)." *Thomas*, 315 F.3d at 196 (3d 2002) (finding evidence of loss or risk of loss required). "The Circuits are not in accord as to the intent required to violate § 1344." *Everett*, 270 F.3d at 990 (6th Cir. 2001) (finding evidence of loss or risk of loss *not* required). In *Thomas*, the Third Circuit specifically acknowledged that its interpretation of the bank fraud statute was contrary to that taken by the Sixth, Eighth and Tenth Circuits. *Thomas*, 315 F.3d at 198 n.2, 200 n.3. On similar facts involving the deposit of a fraudulently obtained federal tax refund check, the Ninth and Seventh Circuits reached different results, the Ninth Circuit affirming a conviction under the bank fraud statute and the Seventh Circuit reversing a conviction under the bank fraud statute. *See McNeil*, 320 F.3d 1034 (9th Cir. 2003); *Davis*, 989 F.2d 244, 247 (7th Cir. 1993). The Ninth Circuit stated: "We disagree with the contrary conclusion reached by the Seventh Circuit in a factually similar case." *McNeil*, 320 F.3d at 1037, *citing Davis*.

C. The Conflict is Ripe for Resolution by this Court.

Due to the conflicting interpretations given to 18 U.S.C. § 1344 by the Circuit Courts, the same conduct is criminal under a federal statute in one circuit, but not in another. This conflict will continue, unless uniformity is brought to the

issue by this Court. The vast majority of the Circuit Courts have examined this issue, reaching different results. This Court will benefit from the analysis, albeit differing, of the eleven Circuit Courts that have opined on the issue. This issue and the conflict surrounding it are ripe for review and resolution by this Court.

This conflict has created an injustice to the extent that federal law is being interpreted and applied inconsistently throughout the United States. In the present case, the bank was not victimized by being exposed to a risk of loss; regardless of how the federally guaranteed student loan was obtained, the bank was always assured that the loan would be repaid. Upon default, the state guarantee agency paid the bank the full amount of principal and interest due on the loan, and the Department of Education, in turn, repaid the guarantee agency. Although the alleged scheme may have defrauded the Department of Education, the scheme did not constitute bank fraud under 18 U.S.C. § 1344, as interpreted by the majority of Circuit Courts that have addressed the issue. Paula Wilson's convictions likely would have been reversed if her appeal had been taken within the jurisdiction of these other Circuit Courts.

II. The Existing Conflict Among the Circuit Courts Presents an Important Issue for the Court's Resolution.

A. The Bank Fraud Statute is Designed to Protect the Important Federal Interest in Protecting the Financial Integrity of Federally Insured Financial Institutions.

The legislative history of 18 U.S.C. § 1344 reflects Congress's intent that the bank fraud statute protect the financial integrity of financial institutions. "In creating the bank fraud statute, Congress noted that 'there is a strong Federal interest in protecting the financial integrity of these institutions, and the legislation in this part would assure a basis for Federal prosecution of those who victimize these banks though fraudulent schemes.'" *United States v. Brandon*, 17 F.3d 409, 426 (1st Cir. 1994), *quoting* S. Rep. No. 225, 98th Cong., 2d Sess. 377 (1983), 1984 U.S. Code Cong. & Admin. News 3517.

The Circuit Courts have observed that Congress's interest in protecting the financial integrity of financial institutions arises from the federal government's role as an insurer of deposits through the F.D.I.C. "The purpose of this section is to protect the federal government's interest as an insurer of financial institutions." *Laljie*, 184 F.3d 180, 189 (2d Cir. 1999). *See also Davis*, 989 F.2d 244, 246 (7th Cir. 1993) (noting that the purpose of the bank fraud statute is "to protect the federal government's interest as an insurer of financial institutions"). Although taking the opposite position on the issue of whether evidence of an actual or potential loss is required, the Sixth Circuit has also recognized that the bank fraud statute arises from the federal government's interest as an insurer of financial institutions. *See Everett*, 270 F.3d 986, 991 (6th Cir. 2001).

There is clearly an important federal interest in protecting the financial integrity of federally insured financial institutions. It is unclear, however, whether certain Circuit Courts are interpreting 18 U.S.C. § 1344 to properly serve this interest. Review and resolution of the conflict among the Circuit Courts would ensure that the federal bank fraud statute is consistently and properly interpreted to serve the federal interest underlying the statute.

B. An Overbroad Interpretation of the Bank Fraud Statute Implicates Federalism Concerns.

The resolution of this issue is important to states that may have state criminal fraud statutes usurped by overbroad interpretations of the federal bank fraud statute. By requiring only that "someone" be defrauded, the Sixth Circuit's interpretation of the federal bank fraud statute is broad enough to sweep in any fraud on any person or entity, regardless of whether a bank is victimized, so long as it involves the transfer of funds by a bank. This transforms the federal bank fraud statute into a general, federalized fraud statute.

By sweeping in conduct criminalized under state law, such broad interpretations of the federal bank fraud statute run afoul of the federalism concerns expressed in *United States v. Lopez*, 514 U.S. 549, 557 (1995) (warning against "effectively obliterating the distinction between what is national and what is local" in context of Commerce Clause challenge). As observed by the Second Circuit, "expansion of the coverage of section 1344 to include conduct that does not victimize federally insured banks and that is already criminal under state law also implicate concerns of federalism." *United States v. Blackmon*, 839 F.2d 900, 906

(2d Cir. 1988). In declining to expand the scope of the bank fraud statute, the Third Circuit also observed, "[t]he extension proposed here by the Government offends the balance of federal and state jurisdiction and our principles of comity by imposing federal law where the federal interest is remote and attenuated." *Thomas*, 315 F.3d at 199.

Resolution of the conflict over the interpretation of the federal bank fraud statute is necessary to ensure that certain Circuit Courts do not read the statute so broadly as to effectively interfere with state criminal fraud laws.

C. An Overbroad Interpretation of the Bank Fraud Statute Contradicts the Clearly Expressed Congressional Intent Behind the Statute.

The Sixth Circuit's interpretation of 18 U.S.C. § 1344 is in direct contradiction of the legislative intent behind the statute. The legislative intent of the federal bank fraud statute is to criminalize schemes that victimize banks, not merely "someone." The Senate Report regarding this provision provides: "The offense of bank fraud in this part is designed to provide an effective vehicle for the prosecution of *frauds in which the victims are financial institutions* that are federally created, controlled or insured." S. Rep. No. 225, 98th Cong., 1st Sess. 377 (1983), *reprinted at* 1984 U.S. Code Cong. & Admin. News 3182, 3517, *emphasis added*. The purpose of the statute is to "assure a basis for Federal prosecution of those who *victimize these banks* through fraudulent schemes." *Id.*, *emphasis added*. In contrast to the mail fraud statute, for which jurisdiction is based on the use of the mail, under the bank fraud statute, "jurisdiction is based on the *fact that the victim of the offense is a federally controlled or insured institution*." *Id.* at 3519, *emphasis*

added. "Where the victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under 1344(a)(2)." *Blackmon*, 839 F.2d at 906 (referring to former § 1344(a)(2), now renumbered as § 1344(2)).

The Sixth Circuit's interpretation of 18 U.S.C. § 1344 effectively creates a statute that Congress did not enact. An overbroad interpretation of the federal bank fraud statute dilutes the underlying meaning of the statute. Review by this Court is necessary to ensure the integrity of the legislation that Congress intended to create.

D. Review and Resolution of this Conflict is Necessary to Provide Lower Courts with the Necessary Guidance to Face Emerging Forms of Fraudulent Conduct.

As technology advances, creating greater access to personal information and more electronic avenues to access financial institutions, new forms of fraudulent conduct will emerge that involve the transfer of funds from and through banking institutions. It is presently unclear, however, how the bank fraud statute should be interpreted to address these emerging forms of fraud. Uniformity of the law is necessary for the lower courts to effectively deal with such new challenges. This petition presents an opportunity for the Court to achieve such uniformity.

CONCLUSION

This petition presents an opportunity for the Court to resolve a direct, irreconcilable conflict among the Circuit Courts as to the correct interpretation of federal statutory law. The underlying issue has been considered by several Circuit Courts, and is ripe for review and resolution. For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 7, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-2646, 02-1026

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARBARA SANDERS, PAULA WILSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: BATCHELDER and LAY*, Circuit Judges.

PER CURIAM. Barbara Sanders and Paula Wilson appeal their criminal convictions for bank fraud stemming from their participation in a federally guaranteed student loan program. Sanders and Wilson challenge the sufficiency of

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* The Honorable Donald P. Lay, Circuit Judge for the United States Court of Appeals, Eighth Circuit, sitting by designation.

the evidence. Wilson also challenges the calculation of her restitution. We affirm the jury's verdict, but remand the case for a new calculation of Wilson's restitution.

I.

Barbara Sanders and Paula Wilson sought loans to attend the Autonomous School of Medical Sciences of Central America. The bank approved Wilson for various student loans. Wilson, however, never applied to or enrolled in the school. Sanders also applied for various student loans, and her checks were sent directly to the School of Medical Sciences. The school returned the checks to the bank because Sanders never applied to or enrolled in the school.

Sanders and Wilson were charged with bank fraud under 18 U.S.C. § 1344 and conspiracy to commit bank fraud under 18 U.S.C. § 371. They were tried together and convicted by a jury. At the close of trial, Wilson made a motion for acquittal based on lack of evidence. The trial court[1] denied the motion. The court sentenced Wilson to five months in prison. Wilson was also ordered to pay $48,960 in restitution. Sanders was sentenced to one month in prison.

II.

Sanders and Wilson claim the Government produced insufficient evidence for a conviction. We do not agree. To convict a defendant under the bank fraud statute,

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1. The Honorable David M. Lawson, United States District Court Judge for the Eastern District of Michigan, presiding.

the Government must prove three elements: "(1) that the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) that the defendant did so with the intent to defraud; and (3) that the financial institution was insured by the FDIC." *United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001). We will reverse a bank fraud conviction only if it "is not supported by substantial and competent evidence." *Id.* It was reasonable for the jury to find that Sanders and Wilson acted with an intent to defraud the banks. The Government showed that Sanders and Wilson submitted student loan applications with no intention of using the loan money for school. The Government also demonstrated that Wilson received loan checks and spent the money on non-educational items. These facts support a conviction for bank fraud.

We also reject Sanders's and Wilson's claim that the Government did not prove they intentionally subjected a federal bank to a risk of loss. Our holding in *Everett* forecloses this argument. In that case, we said that a defendant need not intend to defraud a specific bank or institution. All that is required is that "the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." *Id.* at 991 (emphasis in original). Wilson and Sanders satisfied this requirement. Their fraudulent conduct caused the bank to issue student loan checks to persons who had not applied to or enrolled in the school. We thus conclude that the jury properly convicted Sanders and Wilson of bank fraud and conspiring to commit bank fraud.

III.

We next address the Defendants' challenge to the district court's decision to receive in evidence the testimony of the handwriting analyst. We find that Wilson and Sanders did not preserve this claim for appeal because defense counsel did not properly object to the evidence. At trial, defense counsel only objected to the prospect that the Government would attempt to qualify the witness as an expert and that the witness would be described to the jurors as an expert. Counsel did not object to the admissibility of the testimony. Accordingly, the issue is not preserved for appeal.

Even if we allowed Wilson and Sanders to challenge the admissibility of the handwriting examiner's testimony, we find that the district court properly admitted the evidence pursuant to Federal Rule of Evidence 702. Under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), the trial judge serves as a "gate keeper" to determine whether an expert's testimony is reliable and relevant. *Daubert*, 509 U.S. at 597. The trial judge has "considerable leeway in deciding . . . how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). In the present case, the trial judge ensured that the testimony came from a highly experienced handwriting examiner who carefully explained the basis for his opinion. We thus find no error in admitting the testimony.

Appendix A

IV.

Finally, we must address Wilson's restitution claim. The Government concedes that the district court erred in calculating the amount Wilson must pay in restitution. The district court ordered Wilson to pay $48,960. The record reveals, however, that Wilson made two deposits during the relevant time period totally $32,640. We thus remand this case with a directive to change the restitution amount in Wilson's judgment to $32,640.

APPENDIX B — AMENDED JUDGMENT IN CRIMINAL CASE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN DATED AND FILED DECEMBER 19, 2001

UNITED STATES DISTRICT COURT
Eastern District of Michigan

Case Number CR 99-20033-BC-02
Hon. David M. Lawson

UNITED STATES OF AMERICA,

v.

PAULA WILSON,

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, **PAULA WILSON**, was represented by David B. Herrington

■ The defendant was found guilty on counts **1, 3 of the Indictment** after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Appendix B

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Defraud the United States	August 26, 1998	One
18 USC 1344 and 2	Bank Fraud, Aiding and Abetting	May 1995	Three

The defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed: December 19, 2001

December 12, 2001
Date of Imposition of Judgment

s/ David M. Lawson
David M. Lawson
United States District Judge

Appendix B

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **5 months** on each count, to be served concurrently.

* * *

Appendix B

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$200.00**	**$0.00**	**$48,960.00**
If applicable, restitution amount ordered pursuant to plea agreement			**$0.00**

RESTITUTION

■ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

PAYEES ARE LISTED ON ATTACHED PAGE

Appendix B

RESTITUTION PAYEES

Name, Address and Zip Code of Payee	Total Amount of Restitution Ordered	Priority Order or Percentage of Payment
Michigan National Bank 2777 Inkster Road, M/C 10-82 Farmington Hills, MI 48334 Attention: Andrea David, Student Loan Manager	48,960.00	100%
	48,960.00	

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED MAY 27, 2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-1026

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAULA WILSON,

Defendant-Appellant.

ORDER

BEFORE: RYAN, BATCHELDER, and LAY,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Donald P. Lay, Senior United States Circuit Judge of the Eighth Circuit Court of Appeals, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

(2)

Supreme Court, U.S.
FILED
OCT 27 2003
OFFICE OF THE CLERK

No. 03-304

In the Supreme Court of the United States

PAULA WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction of bank fraud.

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In the Supreme Court of the United States

No. 03-304

PAULA WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 59 Fed. Appx. 765.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2003. A petition for rehearing was denied on May 27, 2003 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on August 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner

was convicted of conspiring to commit bank fraud, in violation of 18 U.S.C. 371, and bank fraud, in violation of 18 U.S.C. 1344. She was sentenced to five months of imprisonment. Pet. App. 6a-8a. The court of appeals affirmed her convictions. *Id.* at 1a-5a.

1. To qualify for a loan under the federally guaranteed loan program, a prospective student completes various forms certifying that she will use the loan proceeds to pay educational expenses while attending the school listed on the application on at least a half-time basis. The student sends the application to the educational institution, which completes the relevant portions, and then forwards the completed application to a guaranty agency. The guaranty agency sends the application to a bank, which issues the loan. Gov't C.A. Br. 4-5.

At the time that the loan involved in this case was made, if the borrower defaulted on the loan, the guaranty agency would reimburse the bank for 98% of the unpaid principal and interest due from the borrower. See 34 C.F.R. 682.401(b)(14) (1998); see also 20 U.S.C. 1078(b)(1)(G). The guaranty agency could, in turn, seek reimbursement from the United States Department of Education. Gov't C.A. Br. 5. In addition, the Secretary of Education paid all interest to the lender on behalf of the borrower while the borrower was in school, and during other periods prescribed by statute or regulation, such as periods of unemployment or economic hardship. 20 U.S.C. 1078(a) and (b)(1)(M); 34 C.F.R. 682.210, 682.300. If, however, the bank discovered that the borrower provided false or erroneous information so that the borrower was ineligible for the loan, the bank was required to refund the interest received from the Secretary. 34 C.F.R. 682.412(d) and (e) (1998).

In 1996, petitioner applied for student loans to attend the Autonomous School of Medical Sciences of Central America in Costa Rica (School of Medical Sciences). C.A. App. 78; Gov't C.A. Br. 4. The Michigan Guaranty Agency forwarded petitioner's applications to the Michigan National Bank, which approved loans totaling $17,000. C.A. App. 78; Gov't C.A. Br. 5. As a result, petitioner received and negotiated checks totaling $16,320. C.A. App. 86-87; Gov't C.A. Br. 5. She never applied to nor enrolled in the School of Medical Sciences. Gov't C.A. Br. 4, 6. Although petitioner made some payments on the loans, she failed to keep up with the payments due and eventually defaulted on the loans. *Id.* at 7; C.A. App. 137.

2. A federal grand jury in the Eastern District of Michigan charged petitioner with conspiring to commit bank fraud, in violation of 18 U.S.C. 371, and bank fraud, in violation of 18 U.S.C. 1344. C.A. App. 25-35. The bank fraud count charged that petitioner "did knowingly execute and attempt to execute a scheme to obtain moneys and funds under the custody and control of a financial institution by means of false and fraudulent pretenses and representations in that [petitioner and a co-defendant] submitted, and aided and abetted each other in submitting, a fraudulent application for federally guaranteed student loans for [petitioner] to Michigan National Bank." *Id.* at 29-30.

At the close of the government's case, petitioner moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 based on the government's purported failure to prove that petitioner signed the student loan application and the promissory notes. The district court denied the motion. C.A. App. 1010-1012. The jury found petitioner guilty on both counts, and the district court sentenced petitioner to concurrent prison

terms of five months on each of the charges. Pet. App. 6a-8a.

3. On appeal, petitioner challenged, among other things, the sufficiency of the evidence on the bank fraud conviction. The court of appeals held that it was reasonable for the jury to find that petitioner intended to defraud the bank when she submitted a student loan application with no intention to use the proceeds for school. Pet. App. 2a-3a.

The court of appeals rejected petitioner's argument, raised for the first time on appeal, that the government did not prove that she intentionally subjected the bank to a risk of loss. Pet. App. 3a. Relying on its earlier decision in *United States* v. *Everett*, 270 F.3d 986 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002), the court held that there is no requirement that the government prove that the defendant intended to expose the bank to a risk of loss. Rather, the court stated, the government must prove only that the defendant, in the course of committing a fraud, caused a bank to transfer funds under its control. Pet. App. 3a. The court found that this requirement was satisfied here because petitioner's "fraudulent conduct caused the bank to issue student loan checks to persons who had not applied to or enrolled in the school" identified in the loan application. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-15) that this Court should grant a writ of certiorari in this case to resolve a conflict among the courts of appeals concerning the scope of the bank fraud statute. She contends that the Sixth Circuit erred and departed from the rule followed in other courts by stating that the bank fraud statute is violated when "the defendant in the course of commit-

ting fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." Pet. App. 3a (quoting *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002)). Although the courts of appeals disagree on whether causing or intending to cause a risk of loss to a financial institution is an element of bank fraud, this case is not an appropriate one to resolve that disagreement. The court of appeals correctly held that causing or intending to cause a risk of loss is not an element of bank fraud. But even courts of appeals that construe the statute more narrowly have held that the conduct for which petitioner was convicted—presenting fraudulent documents to a bank in order to obtain a loan—constitutes bank fraud. The disagreement among the courts of appeals concerns a factual scenario not present in this case—where the bank is not the target of the defendant's deception but is an unwitting instrument in a fraud against a third party. This Court's review is therefore not warranted.

1. The bank fraud statute makes it a crime "knowingly [to] execute[], or attempt[] to execute, a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1344. The statute thus prohibits "any 'scheme or artifice to defraud a financial institution' or to obtain any property of a financial institution 'by false or fraudulent pretenses, representations, or promises.'" *Neder* v. *United States*, 527 U.S. 1, 21 (1999). Congress intended the statute, like the mail and wire fraud statutes, to have a broad scope. See S. Rep. No. 225, 98th Cong., 1st Sess. 378-379 (1983). It has been construed

to encompass a variety of fraudulent schemes that undermine the integrity of the banking system. See *United States* v. *Brandon*, 17 F.3d 409, 426 (1st Cir.), cert. denied, 513 U.S. 820 (1994); *United States* v. *Rackley*, 986 F.2d 1357, 1361 (10th Cir.), cert. denied, 510 U.S. 860 (1993).

This Court has not defined the intent that a defendant must possess in order to violate the bank fraud statute. Nevertheless, the Court's interpretation of the analogous mail fraud statute makes clear that the essence of a bank fraud scheme is "the deprivation of something of value by trick, deceit, chicane or overreaching." *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). For that reason, several courts of appeals have held that the intent necessary for a bank fraud conviction "is an intent to deceive the bank in order to obtain from it money or other property." *United States* v. *Kenrick*, 221 F.3d 19, 26-27 (1st Cir.) (en banc), cert. denied, 531 U.S. 961 (2000); see *United States* v. *McCauley*, 253 F.3d 815, 819 (5th Cir. 2001) ("The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself.") (citation omitted); *United States* v. *LaMarre*, 248 F.3d 642, 649 (7th Cir.) ("'[s]pecific intent to defraud' means that a defendant acted willfully and with specific intent to deceive or cheat"), cert. denied, 533 U.S. 963 (2001); *United States* v. *Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) ("[t]he bank fraud statute condemns schemes designed to deceive in order to obtain something of value").

There is some disagreement among the courts of appeals concerning the intent necessary to constitute

bank fraud in certain circumstances. The disagreement concerns whether, in order to establish that the defendant possessed the requisite intent to defraud, the government must prove that the defendant exposed, or intended to expose, a bank to the risk of financial loss. The First, Sixth, Ninth, Tenth, and Eleventh Circuits have rejected such a requirement. See *United States* v. *McNeil*, 320 F.3d 1034, 1037-1039 (9th Cir.), cert. denied, No. 02-10904 (Oct. 6, 2003); *United States* v. *Everett*, 270 F.3d 986, 991 (6th Cir. 2001), cert. denied, 537 U.S. 828 (2002); *United States* v. *De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001), cert. denied, 535 U.S. 989 (2002); *Kenrick*, 221 F.3d at 29; *United States* v. *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995), cert. denied, 516 U.S. 1082 (1996). The Second, Third, Fifth, and Seventh Circuits, in contrast, have held that the government must prove, as an element of the offense, either that the defendant intended to expose the bank to an actual or potential loss, *United States* v. *Thomas*, 315 F.3d 190, 200 (3d Cir. 2002); *United States* v. *Laljie*, 184 F.3d 180, 189 (2d Cir. 1999); *United States* v. *Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998), or that the defendant placed the bank at risk of civil liability, *United States* v. *Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States* v. *Sprick*, 233 F.3d 845, 852 (5th Cir. 2000); *United States* v. *Davis*, 989 F.2d 244, 246-247 (7th Cir. 1993).[1]

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[1] Petitioner is thus incorrect in asserting (Pet. 6, 11-12) that the majority of courts of appeals have endorsed the approach that he advocates. The cases petitioner cites from the First and Eleventh Circuits (*United States* v. *Brandon*, 17 F.3d 409 (1st Cir.), cert. denied, 513 U.S. 820 (1994), and *United States* v. *Key*, 76 F.3d 350 (11th Cir. 1996)) predate the cases from those circuits explicitly addressing the issue that are discussed in the text above. The Fourth Circuit, in upholding a bank fraud conviction based on the

2. This case is not an appropriate vehicle for this Court to resolve the disagreement among the courts of appeals for two reasons. First, the court of appeals correctly rejected petitioner's contention that exposing the bank to the risk of loss is a required element of bank fraud; and, second, this case does not involve the factual situation that has given rise to the disagreement among the courts of appeals.

a. The court below correctly held that a violation of the bank fraud statute does not require that the bank be exposed to a risk of financial loss. Nothing in the text of the statute suggests that a risk of loss is a component of the offense. See 18 U.S.C. 1344. On the contrary, "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank, is that there be an attempt to obtain such property from the bank by deceptive means." *McNeil*, 320 F.3d at 1037.

As this Court has noted, the statute does not "define[] the phrase 'scheme or artifice to defraud.'" *Neder*, 527 U.S. at 20. But, assuming, as the Court did in *Neder*, *id.* at 21-23, that Congress used the phrase in

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negotiation of forged checks, has stated that "expos[ing]" the bank "to an actual or potential risk of loss" is a required element of bank fraud. *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002) (quoting *United States* v. *Colton*, 231 F.3d 890, 908 (4th Cir. 2000)). But that court has not, as far as the government is aware, reversed a bank fraud conviction based on lack of proof of that element. In *United States* v. *Orr*, 932 F.2d 330 (4th Cir. 1991), cited by petitioner (Pet. 11), the court of appeals reversed the conviction because the defendant's conduct consisted merely of passing checks drawn on insufficient funds, which the court held was not covered under the bank fraud statute. The Eighth Circuit also has not definitively addressed the risk-of-loss issue, although it has held that the bank need not suffer an actual loss. See *United States* v. *Ponec*, 163 F.3d 486, 487 (8th Cir. 1998) (cited at Pet. 13).

accordance with its common-law meaning, the intent element of common-law fraud entails only the "intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (*Prosser*) § 105, at 728 (5th ed. 1984); see *Kenrick*, 221 F.3d at 28; Restatement (Second) of Torts § 525 (1977) ("One who fraudulently makes a representation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."). "[C]ommon-law fraud had no additional 'intent to harm' requirement." *Kenrick*, 221 F.3d at 28 (citing *Prosser* § 107, at 741, and 2 Charles G. Addison, *A Treatise on the Law of Torts* § 1174, at 404 (1881)). Thus, the intent element of common-law fraud provides no basis for a requirement that the government prove that the defendant intended to, or did, expose the bank to a risk of loss. Nor can that requirement be drawn from the reliance or damages elements of common-law fraud, because, as this Court has explained, those elements "plainly have no place in the federal fraud statutes," which prohibit not completed fraud but rather a "scheme to defraud." *Neder*, 527 U.S. at 25. In short, there is no basis in the statutory text or the common law for a risk-of-loss requirement.

b. This Court's review is also not warranted because this case does not involve the factual scenario that has led to the disagreement among the courts of appeals. That disagreement has arisen in cases involving fraud on a third party where the bank was not the "target of deception" but merely an "unwitting instrumentality" in the fraud. *United States* v. *Khorozian*, 333 F.3d 498, 505 (3d Cir.) (quoting *Thomas*, 315 F.3d at 201, and discussing cases), cert. denied, No. 03-398 (Oct. 20, 2003);

see *De La Mata*, 266 F.3d at 1298. For example, in *United States* v. *Blackmon*, 839 F.2d 900 (2d Cir. 1988), on which petitioner relies (Pet. 8), the defendants deceived elderly women into withdrawing money from their personal bank accounts, converting the money to foreign currency, and giving that foreign currency to the defendants; the defendants did not deceive the banks in any way. See *id.* at 902-903. This case, in contrast, involves a relatively common type of bank fraud in which the defendant deceives the bank itself into making bank funds available by submitting fraudulent documents that contain a material misstatement or conceal material information.

All of the courts of appeals that have addressed the issue (including those that impose a risk-of-loss element) agree that such a defendant commits bank fraud. See, *e.g.*, *Kenrick*, 221 F.3d at 29-32; *United States* v. *Chacko*, 169 F.3d 140 (2d Cir. 1999); *United States* v. *Bales*, 813 F.2d 1289 (4th Cir. 1987); *United States* v. *Harvard*, 103 F.3d 412 (5th Cir.), cert. denied, 522 U.S. 824 (1997); *United States* v. *Todosijevic*, 161 F.3d 479 (7th Cir. 1998).

Furthermore, the courts of appeals agree that a defendant who deceives a bank to obtain bank funds commits bank fraud even if the funds that he obtains are fully secured or he expects that they will be repaid. See *United States* v. *Walker*, 871 F.2d 1298, 1304-1307 (6th Cir. 1989) (defendant committed bank fraud because he deceived bank to obtain loans for friends even though borrowers were creditworthy, had the ability to repay the loans, and understood their obligation to do so); *United States* v. *Hollis*, 971 F.2d 1441, 1452-1453 (10th Cir. 1992) ("if a defendant knowingly provided materially false information in order to induce the loan, the crime is complete, and it is irrelevant whether or

not he intended to repay it or was capable of repaying it"), cert. denied, 507 U.S. 985 (1993); *United States* v. *Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992) (defendant committed bank fraud even though loan obtained by deceiving bank was "amply secured").

Petitioner's argument that she did not commit bank fraud because the loan that she fraudulently obtained was indemnified by the guarantee agency is tantamount to a contention that a defendant commits bank fraud only if the bank suffers an actual and permanent loss. But even the courts of appeals that take a narrow view of the scope of the bank fraud statute have held that a showing of actual loss is not required. See, *e.g.*, *Khorozian*, 333 F.3d at 505 n.6; *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002); *McCauley*, 253 F.3d at 820; *United States* v. *Stavroulakis*, 952 F.2d 686, 694 (2d Cir.), cert. denied, 504 U.S. 926 (1992); *United States* v. *LeDonne*, 21 F.3d 1418, 1425 (7th Cir.), cert. denied, 513 U.S. 1020 (1994). Courts of appeals that require that a bank be exposed to a risk of loss have also held that the risk of loss may be slight. See *McCauley*, 253 F.3d at 820; *United States* v. *Jacobs*, 117 F.3d 82, 93 (2d Cir. 1997); *United States* v. *Barakett*, 994 F.2d 1107, 1111 n.15 (5th Cir. 1993), cert. denied, 510 U.S. 1049 (1994).[2]

In this case, the bank from which petitioner fraudulently obtained her student loans not only faced a risk of loss but suffered an actual loss. The bank disbursed checks totaling $16,320. Petitioner did not fulfill her

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[2] Those courts have also made clear that the bank need not be the primary victim of the defendant's fraud. See *United States* v. *Crisci*, 273 F.3d 235, 240 (2d Cir. 2001); *Barakett*, 994 F.2d at 1111. Thus, petitioner is mistaken in contending (Pet. 15) that her scheme was not bank fraud because the primary victim of the scheme was the Department of Education.

obligations to repay the loans and ultimately defaulted on the loans. As a result, under federal regulations, the bank was entitled to reimbursement for only 98% of the unpaid principal and interest balance. See 34 C.F.R. 682.401(b)(14) (1998). In addition, because petitioner was not actually eligible to receive the loans, the bank was required by federal regulations to repay the interest benefits that the bank had received from the federal government. 34 C.F.R. 682.412(d) and (e) (1998). Because the bank both faced the risk of financial loss and actually suffered financial loss from petitioner's conduct, that conduct constituted bank fraud even under the most stringent view of the bank fraud statute.

The court of appeals' conclusion here that petitioner "acted with an intent to defraud the bank[]" (Pet. App. 3a) thus does not conflict with the decision of any other court of appeals. It is therefore premature for this Court to review the Sixth Circuit's broader statement that the bank fraud statute is violated whenever "the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control." *Ibid.* (quoting *Everett*, 270 F.3d at 991); see *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions").

3. Petitioner erroneously contends (Pet. 17-18) that applying the bank fraud statute without requiring proof that the bank was exposed to a risk of loss "run[s] afoul of the federalism concerns expressed in *United States* v. *Lopez*, 514 U.S. 549, 557 (1995)." As discussed above, this case does not implicate that contention, because the bank faced a risk of loss and indeed suffered an actual loss as a result of petitioner's deception. Moreover, even if the conduct involved in a bank fraud cause may be prosecuted in state court, that fact does not preclude

federal prosecution. See *United States* v. *Morgenstern*, 933 F.2d 1108, 1113 (2d Cir. 1991) ("While [defendant's] conduct could have been handled in state court as a simple case of business fraud, this does not preclude treating it as an instance of federal bank fraud if the relevant statutory elements are satisfied."), cert. denied, 502 U.S. 1101 (1992). The bank fraud statute is designed to protect banks from becoming the victims of deception, and it is therefore properly applied whenever a defendant deceives the bank in order to obtain funds under the bank's custody and control. Cf. *United States* v. *Schwartz*, 899 F.2d 243, 247 (3d Cir.) (depositing worthless checks into an account and making withdrawals from that account "cannot be simply dismissed as a 'garden-variety' state case because the product grown here was money which sprouted from worthless checks in circumstances which Congress intended to interdict by the bank fraud statute"), cert. denied, 498 U.S. 901 (1990).

Petitioner also errs in contending (Pet. 16, 18-19) that not requiring a risk of loss contravenes the statute's legislative history. Nothing in the purposes of the bank fraud statute warrants departing from its text by confining its scope to cases in which the bank is exposed to a risk of loss. Congress sought to "assure effective prosecution of the range of fraudulent crimes commonly committed today against federally controlled or insured financial institutions" and thereby to "assure the integrity of the Federal banking system." S. Rep. No. 225, 98th Cong., 1st Sess. 379 (1983). Congress intended that the bank fraud statute would be construed "to reach a wide range of fraudulent activity" and to fill gaps left by existing federal criminal laws. *Id.* at 378; see *id.* at 377. Congress could reasonably conclude, as the text of the bank fraud statute indicates, that ensuring the

integrity of federally controlled and insured financial institutions requires criminalizing *all* attempts to use deception to obtain assets within their custody or control, whether or not the government is able to prove, in a particular case, that the attempt has exposed the bank to a potential loss.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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